No. 75-679

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNAL REVENUE SERVICE,
Petitioner,

vs.

FRUEHAUF CORPORATION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN L. KING
MATTHEW C. MC KINNON
BERRY, MOORMAN, KING, LOTT & COOK, P.C.
2600 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226

MILTON J. MEHL
MEHL, WILLIAMS, CUMMINGS & TRUMAN
2012 Continental Life Building
Fort Worth, Texas 76102

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603

GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondents

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-679

INTERNAL REVENUE SERVICE,
Petitioner,

vs.

FRUEHAUF CORPORATION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESTATED QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are * * * specifically exempted from disclosure by statute." The question presented is whether certain categories of documents such as Internal Revenue Service technical advice memoranda, private letter rulings, and other related files, which contain agency interpretations of the federal manufacturers excise tax law, are excluded from the meaning of the term "return" under 26 U.S.C. 6103, thereby not exempting such documents from disclosure under 5 U.S.C. 552(b)(3).

It has been necessary to restate the question presented since the question as stated by Petitioner was not con-

sidered by either of the lower courts. It does not take into consideration the provisions in the lower court orders for the *in camera* inspection and deletion of privileged and exempt information. Petitioner's question states that private letter rulings and technical advice memoranda as a category are exempt from disclosure because they contain return information. However, the Court of Appeals held that these categories of documents were not returns and to the extent that they might contain exempt information they were subject to *in camera* inspection and deletion prior to disclosure (Appendix A, pp. App. 9-10). Furthermore, the question presented by Petitioner begs the question since it assumes that Section 6103 precludes public disclosure of all documents containing any information which might be included in a federal tax return.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; Section 6103 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration, Section 301.6103(a)-1, are set forth in Appendix C.

STATEMENT

At the time this action was commenced, Respondents were defendants in a criminal prosecution in the United States District Court for the Eastern District of Michigan.[1]

[1] Subsequent to the trial of the criminal case, Respondents obtained from the Treasury Department, as a result of an unopposed Freedom of Information Act request, documents which established that the Government had improperly used a repealed Treasury regulation during trial. Based on this newly discovered information, Respondents have filed a post trial motion for a new trial which the district court has taken under advisement.

In substance, a one count indictment charged that Respondents, over a nine year period from October of 1956 to December of 1965, had conspired to illegally lower the excise tax base on their products, which resulted in the payment of $96,000,000 in taxes as against $108,000,000 alleged to be due and owing.

On October 11, 1972, Respondents, as defendants in said criminal action, in order to obtain information vital to their defense, filed a Motion for Discovery and Inspection and a Motion for Discovery of Exculpatory Information.

In his Memorandum and Orders, dated June 21, 1973, the Honorable Thomas P. Thornton, United States District Judge, presiding, wrote as follows:

> In the Defendants' Motion for Disclosure of Exculpatory Information the Defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. *In its response the Government concedes that* under Sec. 552(a)(3) of the 5 USC (The Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 CFR, Sec. 601.702(c). (Emphasis added.) Appendix B, pp. App. 17.)

Promptly thereafter, on June 26, 1973, Respondents, in reliance upon the representations made by counsel for the government, submitted a written request to the Petitioner to inspect and copy certain excise tax information and documents as provided for in the Freedom of Information Act, hereinafter referred to as FOIA, 5 U.S.C. §552 (Appendix C, pp. App. 20).

Nearly one month later, on July 24, 1973, the Petitioner denied Respondents' request *in toto*. Just six days later, on July 30, 1973, Respondents appealed the July 24, 1973 denial to Donald C. Alexander, Commissioner of Internal

Revenue. Some three weeks later, on August 22, 1973, Respondents' appeal was denied.

On September 14, 1973, the present action was filed wherein Respondents sought disclosure from Petitioner of certain private letter rulings,[2] technical advice memoranda, underlying correspondence and files, and index cards for the period from January 1, 1947, to September

[2] The private letter rulings which are the principal subject of this litigation, are interpretations of the manufacturers excise tax law and regulations and have been issued pursuant to specific sets of facts presented to the Petitioner by taxpayers. In answer to Plaintiffs' Request for Admissions, Petitioner has admitted the following facts:

1. Letter rulings are either "reference" or "routine".
2. Routine rulings files of the Excise Tax Branch, Office of the Assistant Commissioner (Technical), for the years prior to and including 1967, have been destroyed. However, certain files for the years 1959 through 1963 have been preserved because of pending litigation.
3. The function of a private letter ruling is to advise the requesting taxpayer regarding the excise tax treatment which it may expect from Petitioner in the circumstances specified in the ruling.
4. Prior to 1967, private letter rulings were designated as "precedent" or "non-precedent". In 1967, the year the FOIA was enacted, the names of the rulings were changed to "reference" and "routine" respectively.
5. An Index Digest Card file is maintained and refers to those private letter rulings files that have been classified as "reference".
6. Certain excise tax letter rulings are classified as "reference" and digested in the Index Digest Card files, by subject matter but not by Internal Revenue Code section.
7. The employees of Petitioner who prepare the private letter rulings are called Tax Law Specialists. They use, read and refer to previously issued private letter rulings, as well as the Index Digest Card files, in connection with their work of preparing private letter rulings.

13, 1973, in connection with its determinations that certain articles were subject to the manufacturers excise tax and its determinations of the price of these articles under Section 4216 of the Internal Revenue Code (Appendix D, pp. App. 25-30).

The Respondents immediately moved for a preliminary injunction against Petitioner. The Petitioner, in turn, moved for a summary judgment claiming that all of the requested documents were exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b) (3), as "matters that are specifically exempted from disclosure by statute." In substance, Petitioner argued that Sections 6103 and 7213 of the Internal Revenue Code of 1954, which, by their express language apply to returns and income tax returns respectively, exempt "*All* documents relating to

(footnote continued)

8. These employees are responsible for determining which of the private letter rulings are to be classified as "reference" or as "routine".
9. All of the private letter rulings, irrespective of their classification, are included in chronologic files, beginning in July, 1953. These files are not indexed by subject matter or Internal Revenue Code section; however, Petitioner maintains sets of cards in alphabetical order that separately refer to all such files by taxpayer name and date. These cards are maintained, beginning in 1954, in sets of approximately five-year blocks.
10. Petitioner, since 1954, has issued approximately 10,000 so-called "reference" rulings and approximately 30,000 "routine" rulings in the area of federal manufacturers excise tax, but Petitioner has selected, on the average, fewer than 175 of these rulings annually for publication in the Internal Revenue Bulletin.
11. A principal purpose of the ruling process is to achieve uniform interpretation and application of the federal tax laws.
12. Petitioner does not publish or otherwise make available to the public any of the "reference" or "routine" private letter rulings.

the enforcement of the federal revenue laws against specific taxpayers." (Emphasis added.)

The district court heard arguments on Petitioner's motion for summary judgment and subsequently a trial ensued. At the trial the Petitioner called only one witness and presented no evidence in support of its contention that any or all of the documents requested were returns or part of returns within the meaning of Section 6103.

On January 11, 1974, the district court denied the Petitioner's motion for summary judgment and ruled that Respondents were entitled to disclosure of all of the documents requested (Appendix E, App. 31-35).

Petitioner continued to argue in the court of appeals that Sections 6103 and 7213 immunized all documents associated with the administration of the tax laws. The court of appeals rejected this argument (Appendix A, pp. App. 48), holding that it was the intent of Congress that issues of construction of the FOIA be resolved in favor of public disclosure (Appendix A, App. 5). The court of appeals properly recognized that the Act places the burden on the Petitioner to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions and that the Petitioner had not met this burden (Appendix A, pp. App. 5, 7). The court held that letter rulings and technical advice memoranda were not "returns" within the meaning of Section 6103, stating it was in agreement with the rationale of the Court of Appeals for the District of Columbia in *Tax Analysts & Advocates* v. *Internal Revenue Service,* 505 F.2d 350 (D.C. Cir., 1974). The court of appeals further held that none of the exceptions in the FOIA is applicable to the extent that it bars disclosure of the requested documents as a class or group (Appendix A, p. App. 7). To the extent that particular documents might contain exempt information they would be subject to *in camera* inspection and deletion by the district court (Appendix A, p. App. 10).

REASONS FOR DENYING THE WRIT

Respondents emphasize that this case concerns only documents relating to the interpretation of the manufacturers excise tax law and *not* income tax law. Thus, any inquiry concerning Congressional intent regarding the privacy of information must be viewed in the light of the policies and purposes underlying the manufacturers excise tax.

It is difficult to imagine the dire consequences to our self-reporting tax system which the Petitioner predicts if it is required to make available to Respondents the requested information.[3] Certainly, the purpose of the nondisclosure provisions of Section 6103 as Petitioner points out, is to maintain taxpayer compliance, i.e., to encourage taxpayers fully and accurately to report all taxable transactions. The purpose, as this Court held in *Boske* v. *Comingore,* 177 U.S. 459, 470 (1900), is to protect "(t)he interests of persons *compelled,* under the revenue laws, to furnish information. . . ." (Emphasis added.)

It is not the purpose of Section 6103 to prevent the public from learning of a body of secret law, (i.e., the government's interpretation of the tax laws made known to only a select few) which gives a competitive advantage to one taxpayer over another. At the outset, it must be pointed out that the unique manner in which excise tax liability is determined has encouraged the development of just such

---

[3] Apparently even Petitioner does not take this argument too seriously, since it has proposed legislation to Congress which would permit the disclosure of private letter rulings to the public. (Appendix F).

a body of secret law. Without payment of a proposed *income tax* deficiency, a taxpayer may litigate the issue in the United States Tax Court, which has no jurisdiction over manufacturers excise taxes. On the other hand, the federal tax laws require a taxpayer against whom an *excise tax* deficiency is charged to pay a tax before undertaking refund litigation in the court of claims or the district court. Consequently, comparatively few excise tax cases are litigated. Taxpayers subject to the manufacturers excise tax generally seek advice on proposed excise tax transactions by requesting private letter rulings from the Petitioner. As a result, taxpayers involved with excise tax do not have a body of interpretative law comparable to that which has accumulated through income, estate and gift tax litigation in the United States Tax Court. Private letter rulings and technical advice memoranda have become essential sources of interpretation of the excise tax law.

Petitioner claims that it was the intent of Congress to allow government agencies to apply "their statutes" to protect documents in their custody. It is clear that Congress gave no such "blank check" to each agency so that it could insulate itself from the provisions of the FOIA whenever it chose.

Exemption 3 does not state "except as specifically provided by the agency" (viz., the Petitioner), but very clearly provides "as specifically exempted from disclosure by statute." *There is no statute (including the Internal Revenue Code) which specifically bars the disclosure of excise tax private letter rulings, technical advice memoranda or underlying documents.* It is the Petitioner which is attempting to broaden the scope of the specific statutory language of Exemption 3 to suit its own purposes. Such action attempts to circumvent the clear mandate of the FOIA.

While this Court has recently recognized that Exemption 3 of the FOIA contains no "built-in" standard as is the case with the other exemptions of the FOIA, the exemptions nevertheless represent the *congressional judgment* as to whether certain information in the executive branch must be kept confidential. *Administrator, Federal Aviation Administration* v. *Robertson,* 43 U.S.L.W. 4833, (U.S. June 24, 1975). In that case, pursuant to specific congressional legislation, 49 U.S.C. § 1504, upon written objection by any affected person, the Administrator was granted discretion to withhold information from public disclosure which in his judgment would adversely affect the interests of that person and which was not required in the interest of the public. Section 6103 does not give to the President, the Secretary of the Treasury or the Petitioner any discretion to decide what information may be withheld from public disclosure. Congress has provided that returns and only returns are not subject to public disclosure without prior approval. Nor does the statute give the President, the Secretary or the Petitioner the discretion or power to define "return" in such a way as to insulate all information in the files of Petitioner from disclosure.

This Court has stated in *Administrator, supra* that it was the clear intention of Congress that all of the 100 exemption statutes (including Section 6103) in effect at the time of the enactment of the FOIA should remain unaffected by the new Act.

As shown by the legislative history of Section 6103, Congress did not intend that Petitioner should be permitted to expand the term "return" to encompass the documents which are the subject matter of this action. The predecessors of Section 6103 date back almost 66 years.

The Act of August 5, 1909, ch. 6, § 38, 36 Stat. 11, in language similar to the current Section 6103, while designating returns filed thereunder to be public records, contained nondisclosure provisions making it unlawful to divulge information contained "in returns", except upon the special direction of the President, and imposed penalties similar to those contained in the current Section 7213, which is applicable only to *income* tax returns. Similarly, the Act of June 17, 1910, ch. 297, § 1, 36 Stat. 468, provided that tax "returns" filed pursuant to the corporation tax statute enacted in 1909 should be "open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."

The Income Tax Act of 1913, the first income tax law enacted following ratification of the Sixteenth Amendment to the Constitution, also provided that tax returns made under the Act should be "open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." Income Tax Act of 1913, ch. 16, § IIG(d), 38 Stat. 114. Subsequent to the enactment of the Income Tax Act of 1913, the language of the nondisclosure provisions in the federal revenue laws has remained relatively unchanged. Thus, the meaning of the term "return" must be determined from what Congress understood that term to encompass at the time of these early revenue acts.

In 1913, Congress could not have considered the term "return" to include private letter rulings, since the Petitioner's rulings program, as presently constituted, is barely 30 years old. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles,* 20 N.Y.U. Institute on Federal Taxation 1, 2 (1962). As

the former Commissioner of Internal Revenue points out, even an informal rulings program, which consisted of answers to taxpayers' questions, did not arise until after the enactment of the Income Tax Act of 1913.

Nothing in the case of *Boske* v. *Comingore,* 177 U.S. 459 (1900), which predates the first predecessor of Section 6103 by almost nine years, supports the Petitioner's position that all documents containing "return information" are exempt from general disclosure by virtue of Section 6103. In that case, a U.S. Internal Revenue collector had been imprisoned "for refusal to file with his deposition taken by the State of Kentucky, copies of certain reports made to him by Block & Sons, distillers. . . ." During his deposition the collector stated that the distiller had "made monthly reports to his office of liquors manufactured by them and deposited in bonded warehouses."

This Court correctly held that such reports should not be released by the collector. They contained commercial and financial data of a taxpayer which continue to be confidential and exempt from disclosure under Exemption 4 of the FOIA and the order appealed from. It will also be noted that those reports were demanded by the State of Kentucky. Today, Congress, by statute, has provided for the disclosure of tax return information to the various state revenue departments. 26 U.S.C. 6103(b).

Favorable private letter rulings, especially excise tax rulings, generally have the effect of reducing tax revenue and result in tax benefits to those who receive them. In many respects, a revenue ruling is similar to a court decision in which the taxpayer seeks a benefit and obtains an adjudication. Court decisions are public and recite facts, including confidential information where necessary to the decision. The taxpayer who invokes the court's

jurisdiction to get his liability reduced is not discouraged from doing so by the disclosures he necessarily makes. This is the price he pays—and gladly—for the chance at a tax reduction. The nondisclosure requirements of Section 6103 were never intended to apply to the interpretations of law resulting from the rulings process.

In spite of the announced purpose of the Petitioner to achieving uniform application of the tax law by the use of revenue rulings,[4] in many cases those who receive a favorable private letter ruling or technical advice memoranda are receiving favored tax treatment from the Petitioner, resulting in disparity in the application of the tax law. *International Business Machines Corp.* v. *United States,* 343 F.2d 914 (Ct. Cl., 1965) *cert. den.* 382 U.S. 1028 (1966). In that case, the Petitioner issued a favorable private letter ruling to a competitor of I.B.M., exempting it from the manufacturers excise tax on computers manufactured by it. When I.B.M. learned of this, it also sought an exemption for similar computers manufactured by it. The Petitioner issued an unfavorable ruling to I.B.M. and revoked the prior favorable ruling issued to its competitor. As to the competitor, application of the ruling was made *prospective* only. The court of claims held that I.B.M.'s competitor had been unduly favored in the promulgation of this ruling, and that I.B.M. could recover taxes paid by it.

In support of its holding, the court quoted with approval Mr. Justice Frankfurter's view as to disparity of treatment by the Petitioner:

> The Commissioner cannot tax one and not tax another without some rational basis for the difference. *United States* v. *Kaiser,* 363 U.S. 299, 308 (1960).

---

[4] See fn. 2, *supra.*

In addition, at least in the area of *excise* tax, Congress intended that private letter rulings would not only be disclosed to parties other than those to whom the rulings were issued, but also that these parties could rely on such rulings. Section 1108(b) of the Revenue Act of 1926, *which is still in effect,* provides:

> No tax shall be levied, assessed or collected . . . on any articles sold or leased by the manufacturer, . . . if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer . . . parted with the possession of such article, *relying upon the ruling,* regulation or Treasury decision. (Emphasis added.)

As can be seen, in order to obtain the benefit of this statute, all that is required is that the ruling or regulation or Treasury decision be in existence and that the manufacturer rely thereon. The ruling need not have been issued to the manufacturer. There is no comparable *income tax* provision. This section was enacted together with an income tax nondisclosure provision (Section 3167) which is the predecessor of Section 7213 of the Internal Revenue Code of 1954. Thus, it appears that Congress felt that equality of treatment with regard to the levy and enforcement of the *excise* tax laws outweighed considerations of confidentiality. As stated by the court of claims in *International Business Machines Corp.* v *United States, supra:*

> For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis. *Automobile Club of Michigan* v. *Commissioner, supra,* 353 U.S. at 186, and other cases cited *supra* at page 920 of 343 F.2d. Parity in the levying of manufacturer's excises is peculiarly essential to free and fair competition. See *Exchange Parts Co.* v. *U.S., supra,* 279 F.2d at 253, 150 Ct. Cl. at 541, H. Rept. No. 708, 72d Cong. 1st Session, pp. 31, 32 (1932).

Petitioner, at page 10 of its Petition, asserts that there is a congressional policy "against disclosure of Internal Revenue Service information relating to the *liability* of a particular taxpayer." If Petitioner would confine its argument to commercial and financial information exempt under 5 U.S.C. 552(b)(4), Respondents would agree to the privileged and confidential nature of such information. Respondents are not requesting information relating to the liability of a particular taxpayer, but only those documents in the files of the Petitioner concerning the interpretation of the excise tax law. This information has heretofore been kept secret and is not available to the public from any other source. As the lower courts have recognized, there is an infinite difference between disclosing "the law" and disclosing commercial and financial information contained in a tax return. Furthermore, the FOIA provides that "an agency may delete identifying details." 5 U.S.C. 552(a)(2)(C) (Appendix C, pp. App. 20.)

As it did in both lower courts, Petitioner, at page 10, takes the position (which the lower courts rejected) that "the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability." It is difficult to believe that Petitioner is serious about such a far-reaching statement. There are many documents filed with various governmental agencies which contain information that is also included in federal tax returns. These documents contain information relating to gross income, expenses, assets and liabilities of taxpayers, which has also been reported to the Petitioner in tax returns. For example, certain pension and profit sharing plan information is filed with the Department of Labor. Statistical information, reported in federal tax returns, must be filed with the Securities and

Exchange Commission. Is the Petitioner contending that such agencies are not required to disclose the documents involved because, in its words, they contain information included in federal tax returns? Respondents would hope not. Such a premise would make a mockery of the FOIA and of the longstanding statutes, rules and regulations permitting their disclosure.

A Quarterly Federal Excise Tax Return, Form 720 (Appendix G, pp. App. 37), is an extremely simple form. It consists of only one page and involves only three simple steps, viz.—(1) total the gross amounts of various excise taxes reported, (2) add or subtract adjustments to arrive at excise tax as adjusted, and (3) subtract excise tax deposits made for the quarter to arrive at excise tax due. There are no estimated returns for manufacturers excise taxes. There are no separately printed schedules for attachment to Form 720.

On the other hand, a private letter ruling is:

> A written statement issued to a taxpayer or his authorized representative by the national office which *interprets and applies the tax laws* to a specific set of Facts. Treas. Reg. §601.201(a)(2). (Emphasis added.)

See also *Tax Analysts & Advocates* v. *Internal Revenue Service*, 505 F. 2d 850, 852 (D.C. Cir. 1974).

The courts of appeal for both the District of Columbia and the Sixth Circuit observed:

> Letter rulings are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consummated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recom-

> mendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director of the Internal Revenue Service is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 351-355. (Appendix A, p. App. 8.)

The Internal Revenue Service Manual defines technical advice as:

> (T)echnical advice means advice or guidance as to the interpretation and proper application of Internal Revenue laws, related statutes, and regulations, to a specific set of facts, furnished by the National Office upon the request of a district office in connection with the examination of a taxpayer's return or consideration of a taxpayer's return or claims for refund or credit. It is furnished as a means of assisting Service personnel in closing cases and establishing and maintaining consistent holdings in the several districts. It does not include memoranda on the matter of general technical application furnished to district offices where the issues are not raised in connection with the examination of the return of a specific taxpayer. I.R.S., Statement of Procedural Rules, Treas. Reg. § 601.105 (b)(5)(i) (1973).

From this definition it can be seen that technical advice, for all practical purposes, is the same as a private letter ruling. It is, in effect, an interpretation of the Internal Revenue law based upon a given set of facts. From this standpoint, it is nothing more than a private letter ruling which is issued after a tax return has been filed.

In practice, it is usually the taxpayer who requests the technical advice. The Petitioner recognizes this in its Statement of Procedural Rules:

> (W)hile the case is under the jurisdiction of the district director, a taxpayer or his representative may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. Treas. Reg. § 601.105(b)(5)(iii)(a) (1973).

The Petitioner contends that technical advice memoranda should be exempt from disclosure because they are similar to an Internal Revenue agent's audit report. Such is not the case. A true "audit report" is a report made by an Internal Revenue agent at the conclusion of his examination of a taxpayer's tax return as well as its records, books, invoices, etc. It contains financial information of the taxpayer and the agent's determination of a proposed tax deficiency or overassessment. Conversely, a technical advice memorandum is issued by the Petitioner, usually at the request of a taxpayer who is seeking an interpretation of the tax law which may remain unknown to other taxpayers. It usually involves a single issue of law. The taxpayer's portion of the memorandum is almost always based on a narrow set of facts and rarely, if ever, contains financial information or trade secrets. There is no compulsion for any taxpayer to request technical advice and no statutory requirement that Petitioner issue any.

Petitioner refers to Section 301.6103(a)-1(a)(3) of Internal Revenue Regulations (26 C.F.R.) defining the term "return" as though it had the force of law. It does not. The broad language of the quoted regulation dates only

from February 18, 1972, and Congress has not reenacted Section 6103 since that date. In 1961, the Petitioner, in Treasury decision 6543, promulgated Treasury Regulation Sec. 301.6103(a)-1. 1961-1 Cum. Bull. 671. Included in this Regulation was the following definition of "return":

> (3) Terms used — (i) Return — For purposes of Section 6103 (a), the term 'return' includes information returns, schedules, lists, and other written statements filed with the Internal Revenue Service *which are designed to be supplemental to or to become a part of the return,* and, in the discretion of the Secretary or the Commissioner or the delegate of either, other *records or reports containing information included or required by statute to be included in the return.* . . . (Emphasis added.)

This definition of "return" was carried forward substantially unchanged until February 18, 1972, when the definition as stated in the present Regulation, §301.6103(a)-1(a)(3), was promulgated by Treasury Decision 7162. 1972-1 Cum. Bull. 382. As can be seen, for eleven years, the Petitioner did not consider the term "return" to include "all documents related to the levy and collection of federal taxes" as it now contends. Only those information returns, lists, schedules and written statements which were "designed to be supplemental to or to become part of a return" constituted a "return" when the FOIA was enacted in 1966. Under *Administrator, supra,* these would be the only exempt items that Congress intended to remain unaffected by the Act.

Treasury decision 7162 declared that it was designed "to clarify the definition of the term 'return' under Section 6103 of the Internal Revenue Code of 1954." It does more than merely remove the discretionary powers of the Commissioner as contended by Petitioner. The list of

types of information in subsection (b) is obviously intended to be more encompassing than the limits intended by Congress. Moreover, the limitation contained in the prior regulation that the information "included or required by statute to be included in the return" was deleted. These extensive changes cannot be deemed a mere clarification.

In summary, Reg. 301.6103(a)-1(a)(3), insofar as it defines "return", exceeds the bounds of Section 6103 of the Internal Revenue Code of 1954, and as such is a nullity. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936). See also Randolph Paul, *Studies in Federal Taxation,* (Third Series) 435 (1940): "if the Regulation definitely goes beyond the limits of the statute, no amount of legislative reenactment will validate the ruling." In the present case, the regulation obviously goes beyond the limit of the statute.

At Page 11 of the Petition it is asserted that by enacting Exemption 3 of the FOIA "Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes." This is not true. Senate Report No. 813, dated October 4, 1965, which accompanied Senate Bill 1160 (the FOIA) states on page 3:

> After it became apparent that Sec. 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.
>
> • • •
>
> *It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.* . . (Emphasis added.) S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

Petitioner claims that disclosure of the requested documents is prohibited by Exemption 3, which provides that

all matter "specifically exempted from disclosure by statute" shall not be disclosed. This exemption, as are all of the exemptions, is expressly limited by Subsection (c) of the FOIA, which provides:

> This section does not authorize withholding of information or limit the availability of records to the public except as *specifically* stated in this section. . . (Emphasis added.) 5 U.S.C. § 552(c).

The Senate Report at page 10 states:

> The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e). S. Rep. 813, 89th Cong., 1st Sess. (1965).

The House Report is almost identical. H. Rep. No. 1497, 89th Cong., 2d Sess.

Respondents submit that Congressional intent under the FOIA is to protect the public by requiring full disclosure of the secret law accommodated in private letter rulings and technical advice memoranda. As the Senate Report, *supra,* states, "it is not for the agency to tell the public what documents it will disclose but rather to establish a general philosophy of full agency disclosure unless information is exempted under *clearly* delineated statutory language."

As repeatedly stated by Respondents, they do not seek disclosures of excise tax returns. They are seeking interpretations of the excise tax law as contained in excise tax private letter rulings and technical advice memoranda issued by Petitioner. The fact that these interpretations of law may contain some information which might be

exempt under Section 6103 would not justify a categorical bar to their disclosure.

The FOIA protects against the unwarranted invasion of the personal privacy of the public by providing that:

> . . . to the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available for publication an opinion, statement of policy, interpretation, or staff manual or instruction. 5 U.S.C. § 552 (a)(2)(C).

In the case of exemptions under the FOIA, including Exemption 3, Congress has recently given guidance in providing a workable formula whereby the interests of both the government and the public can be protected. The last sentence of Section 552(b) of the FOIA, as amended November 21, 1974, provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. 5 U.S.C. 552 (as amended by Section 1(b) and 2(c), Pub. L. 93-503, 93D Cong., 20 Sess., 88 Stat. 1561, 1564).

In summary, interpretations of the law are clearly not tax returns. To the extent that such interpretations may contain exempt information such information should be deleted and the remainder should be disclosed as Congress clearly intended. Respondents are required by the FOIA to pay fees for searching, examining and producing the documents furnished. They have made such payments and continue to be willing to do so. The fact that difficult questions of judgment on the part of the Petitioner may be involved in complying with the FOIA is not sufficient reason to deny disclosure.

CONCLUSION

It is requested that the Court support the clear Congressional intent as well as the decisions of the lower courts and deny the Petition for Writ of Certiorari filed by the Petitioner.

Respectfully submitted,

JOHN L. KING
MATTHEW C. MCKINNON
BERRY, MOORMAN, KING, LOTT & COOK, P.C.
2600 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226

MILTON J. MEHL
MEHL, WILLIAMS, CUMMINGS & TRUMAN
2012 Continental Life Building
Fort Worth, Texas 76102

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603

GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondents

Dated: December 12, 1975.

APPENDIX

APPENDIX A

No. 74-1474

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT D. ROWAN,

Plaintiffs-Appellees,

v.

INTERNAL REVENUE SERVICE,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 9, 1975.

Before: MILLER, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. In this action brought by plaintiffs under the Freedom of Information Act, 5 U.S.C. ¶552, (F.O.I.A.), the Internal Revenue Service appeals from an order of the district court requiring that agency to make available for inspection and copying a large number of documents in the possession of the Excise Tax Branch of the Miscellaneous and Special Provisions Tax Division of the Office of Assistant Commissioner (Technical). The documents ordered to be produced consist primarily of unpublished private and letter rulings relating to the manufacturers excise tax as imposed upon sales of trucks and trailers, but also include the files underlying twenty-three published Revenue Rulings, communications between the Service and persons outside the Executive Branch, and

indices and card files relating to the foregoing. The complete list of documents is described in the court's order, which is attached hereto as Appendix A.

The information sought does not pertain to the federal income tax, but is confined to interpretations of the manufacturers excise tax under Section 4061(a) of the Internal Revenue Code, 26 U.S.C. §4061(a), and the definition of the price for which an article is sold as set forth in Section 4216.

The order appealed from specifically provides that the described documents shall be made available intact and without deletion,

> "except for those items which, . . . defendants submits to the court . . . sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the court . . ., as to whether the proposed deletions are justified under the Freedom of Information Act together with a detailed written explanation of the justification for each deletion . . ."

The government opposed disclosure below, claiming that the documents requested were exempt under one of the nine exemptions to the Act, § 552(b) (3), which provides that the Act is not applicable to matters "specifically exempted from disclosure by statute". The Service urges that, as described in the district court's order, the documents are exempt under the Internal Revenue Code, 26 U.S.C. §§ 6103, 7213. Section 6103 provides in part, that

> ". . . All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B, chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President." 26 U.S.C. § 6103(a) (2)

Section 7213 provides for criminal penalties for disclosure by government employees of certain information, including income returns, sources of income and profits.[1]

---

[1] 26 U.S.C. § 7213, Unauthorized disclosure of information. Subsection (a)(1) provides:

> (a) *Income Returns.*—
>
> (1) *Federal employees and other persons.*—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Subsection (b) provides:

> (b) *Disclosure of Operations of Manufacturer or Producer.*—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

The government further asserts that the district court had and should have exercised equitable discretion to withhold the relief even if it were otherwise called for under the Act.

We reject both of these contentions and affirm the judgment of the district court. We hold that while the district court erred in construing 26 U.S.C. § 6103 as extending the protection of privacy to persons filing income tax returns only, its order for disclosure was nonetheless proper when construed to reserve in the court the right, upon *in camera* inspection, to deny disclosure of any specific documents in which the deletion of protected matter will not suffice to preserve any exemption which may be validly asserted with respect thereto.

We also reject the appellants' argument that "even assuming, *arguendo,* that the documents in issue are not specifically exempt from disclosure by statute, . . . the district court erred in failing to exercise its equitable jurisdiction to decline to issue an order compelling disclosure".

It is important to understand at the outset what this appeal does not involve. First, no issue is raised that the documents sought, as numerous as they may be, are not "identifiable records" within the meaning of § 552(a) (3). Second, no constitutional question is presented. Third, no claim is made that *in camera* inspection by the trial court to sift out privileged matter is forbidden, as is classified matter under subsection (b) (1) of the Act, *EPA* v. *Mink,* 410 U.S. 73 (1969).

Finally, while the Act lists nine exemptions to which its provisions shall not apply, the Internal Revenue Service relies only upon that contained in subsection (b) (3), matters "specifically exempted from disclosure by statute".

As the Supreme Court pointed out in *EPA* v. *Mink, supra,* the F.O.I.A. was enacted in response to the shortcomings of its predecessor, Section 3, which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute". 410 U.S. at 79. While the Act may have its imperfections in drafting,[2] the intent of the Congress that issues of construction be resolved in favor of public disclosure is unmistakable, and our circuit as well as others, has consistently recognized this. *Tennessean Newspapers, Inc.* v. *Federal Housing Administration,* 464 F.2d 657 (6th Cir. 1972); *Hawkes* v. *I.R.S.,* 467 F.2d 787 (6th Cir. 1972); *Soucie* v. *David,* 448 F.2d 1067 (D.C. Cir. 1971).

The Act places upon the agency the burden to impose specific objections to disclosure, and to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions. *EPA* v. *Mink, supra,* at 79. The policy of the Act favors disclosure and thus mandates that the exemptions be construed narrowly. *Soucie* v. *David,* 448 F. 2d 1067 (D.C. Cir. 1971).

The government contends that the letter rulings and other materials sought constitute "returns" within the meaning of 26 U.S.C. § 6103, or are exempt as privileged material under 26 U.S.C. § 7213. It asserts that certain of the documents may be attached to an excise tax return or may involve information contained in a tax return, and claims broadly that it was the "obvious intent of Congress to restrict access to all documents associated with the administration of the tax laws".

---

[2] This is the position taken by Professor Kenneth Davis. See Davis, Administrative Law Treatise (1970 Supplement) at 115.

While an injunction has been issued and stayed pending appeal, neither the trial court nor this court has had the opportunity to examine the precise documents desired to determine whether they are subject to disclosure. We thus find ourselves in much the same position as we did in *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (6th Cir. 1972). In that case disclosure of certain portions of an Internal Revenue Manual by a taxpayer indicted for tax fraud was opposed on the assertion that disclosure was excluded under 5 U.S.C. § 552(b) (2), excluding matters "related solely to the internal personnel rules and practices of an agency". As Judge Celebrezze there observed:

> "Neither this court nor the district court has examined the Manual portions sought. It is therefore impossible for us to state authoritatively which portions are subject to compulsory disclosure, although it would appear that several sections at least of the Manual would provide guidance as to the Service's understanding of substantive law and relevant procedures and would therefore be subject to disclosure under (a) (2) (C). *In camera* [italics in quoted text] inspection of the Manual would provide a basis for application of the guidelines for disclosure suggested in this opinion and a remand for such inspection and evaluation seems reasonable." *Hawkes* v. *I.R.S., supra,* at p. 796.[3]

Formulated on the guidance of *Hawkes, supra,* the district court injunction permits submission to the court for *in camera* inspection of any documents in which the Service believes deletions are justified.

---

[3] *Hawkes* was remanded to the district court for *in camera* examination. Following such examination the district court concluded the materials were subject to disclosure and ordered the materials made available to plaintiff. This court affirmed that decision in *Hawkes* v. *I.R.S.,* 74-1190 (decided and filed December 23, 1974).

The position of the Service is broad rather than specific, perhaps in part because the order itself deals more in categories than in specifically identified documents. For this reason we conceive our role at this stage to be limited largely to determining whether the types of documents described are so clearly within the exemption of 26 U.S.C. §§ 6103 and 7213 and the injunctive order appealed from must be reversed and the suit under the Act dismissed. We determine that the Service has not maintained its burden of showing, at this stage, that the material requested is within the specific exemptions of the statutes relied upon so as to make reversal necessary.

The nature of certain of the documents sought, however, is known and can be ruled upon on a categorical basis. Letter rulings, as such, have a rather well defined meaning. The Secretary of the Treasury has defined a letter ruling as:

> "A written statement issued to a taxpayer or his authorized representative by the national office which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a) (2).

See also *Tax Analysts and Advocates* v. *I.R.S.,* 505 F. 2d 350, 352, (D.C. Cir. 1974).

We hold that letter rulings are not "returns" within the meaning of 26 U.S.C. § 6103 and hence are not exempt for that reason under § 552(b) (3) of the Act. We are in agreement with the rationale of the District of Columbia Circuit in *Tax Analysts and Advocates* v. *I.R.S.,* 505 F. 2d 350 (D.C. Cir. 1974), and with that of Professor Davis in his treatise, Davis, *Admin. Law Treatise,* (1970) § 3A.9 at 130. In *Tax Analysts, supra,* the court emphasized that such letter rulings are generated by the agency rather than the taxpayer. It further stated:

> Letter rulings are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consumated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recommendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 354-355.

We also agree with the court in *Tax Analysts* that letter rulings are not rendered exempt by Treasury Regulation § 301.6103(a)-I (a) (3) (Feb. 8, 1972), which amended the earlier definition of "return" and broadened it. While certain letter rulings may fall within the literal language of that regulation, we agree that the regulations, promulgated here by the regulated agency, "cannot immunize letter rulings from disclosure under the Freedom of Information Act", beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1.

The District of Columbia Circuit further ruled in Tax Analysts that, under §§ 6103 and 7213 of the Internal Revenue Code, technical advice memoranda written in conjunction with income tax returns were exempt from disclosure under § 552(b) (3). We do not reach that precise question here as the order here most carefully limits disclosure to "those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers". So limited, and with the retained power in the court to make necessary deletions, we think such portions do not come within the exemption of § 6103.

In his memorandum opinion, the district judge below observed:

> "We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income* Tax returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code." 369 F. Supp. at p. 110.

The quoted language is troublesome in two respects. First, we agree that probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group. We do not read it as meaning, however, that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories. Indeed, so much seems to be recognized by the broad language of the order referring to "whether the proposed deletions are justified under the Freedom of Information Act." Second, it is apparent from an examination of the language of § 6103 that the district judge erred at least to the extent of holding that § 6103(a) (2) applies only to income tax returns. It does not, but rather expressly applies as well to taxes imposed under chapter 32, which of course relates to excise taxes. Since, therefore, the possibility remains that the exemp-

tion of § 6103 may be found to apply to a specific document which may be delivered over for *in camera* inspection, the district judge will wish to bear this in mind during inspection. This is particularly true with respect to any inspection of files applicable to the issuance of the enumerated Revenue Rulings under Section (2) of the order. The order as entered, however, appears to retain sufficient flexibility to permit this determination to be properly made by the trial court.

A further complaint of the Internal Revenue Service is that the district court's opinion made no mention of its claim that a further exemption from disclosure of the requested documents is created by the provisions of 26 U.S.C. § 7213(a) and (b). The government argues that "while concededly its specific terms do not encompass excise tax returns *per se*, logic dictates the conclusion that it applies to information submitted in connection with such returns."

Section 7213(a) quite expressly refers to *income* returns, both in its heading and repeatedly throughout the body of the text. Unlike Section 6103(a) (2), Section 7213(a) makes no reference to "chapter 32" or otherwise evinces an intent to include information regarding *excise* tax returns within its scope. Contrary to the assertion of the government, logic supports the more restricted meaning, especially since the section imposes criminal penalties. We have been shown no authority to the contrary.[4]

Section 7213(b) is more general in scope than (a) and is not geared to the return of any particular tax. It is direct-

[4] *Tax Analysts and Advocates* v. *I.R.S., supra,* of course did not involve a dispute as to the applicability of § 7213 to excise taxes. That case involved documents related to income tax only.

ed toward precluding disclosure of certain types of information obtained by officers or employees as a consequence of a visit by such persons to any manufacturer or producer in the discharge of official duties. The order as framed does not reveal that any such type information is contained within the documents affected. However, if upon *in camera* inspection, material covered by § 7213(b) should appear, we believe the order of the district judge retains sufficient flexibility in the court to protect against its disclosure.

EQUITABLE JURISDICTION ISSUE

The government contends that if the documents in issue are not specifically exempt from disclosure by statute, the district court nonetheless erred in declining to exercise its equitable discretion to refuse disclosure, relying upon certain language in *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 20 (1974):

> "With the express vesting of equitable jurisdiction in the district court by § 552(a) there is nothing to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."[5]

The Service also relies upon the comments of Professor Davis in his Administrative Law Treatise:

> "The equity practice is clear and strong. The court that has jurisdiction to enforce the information Act

[5] The Service relies upon *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1 (1974), as support for its claim that the power to grant equitable relief carries with it the power as well to deny it upon a showing of valid equitable considerations to the contrary. The case, however, involved the issue of whether equitable discretion could be employed to grant additional remedies and not whether the discretion would permit a withholding of relief under the Act.

> also has jurisdiction to refuse to enforce it whenever equity traditions so require". (1970 Sup.), § 3A.6, at 124

Many of the arguments proffered by the government in support of its contention that relief should be withheld here are those which have been considered and rejected by Congress. Indeed, the government argues not that the "equities" or facts of this particular case necessitate non-disclosure, but that the categories of documents requested should, for general policy reasons, be exempt. We find these reasons inadequate in light of the clear intent of Congress favoring disclosure.

The legislative history to the Act reveals that Congress did not intend general notions such as "public interest" to shield information from the public:

> Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—'requiring secrecy in the public interest', or 'required for good cause to be held confidential'.
>
> It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. Senate Rep. No. 813, 89th Cong., 1st Sess. at p. 3.

The Internal Revenue Service urges that its letter ruling program will be destroyed if the rulings are disclosed. In addition to the fact that no proof of this appears on the record, this is an argument for the legislature, not the court.

As an alternative to an outright ban on all disclosures, the Service asks "that this court should at a minimum modify the district court order to preserve the confidentiality of documents and correspondence in the Internal Revenue Service's possession" primarily because, it urges, much of the information was submitted in the good faith belief that the documents would be kept confidential. In effect, the Service asks that any ruling which makes such documents generally disclosable should be prospective only, so that administrative procedures may be adopted to protect against unwarranted disclosure of confidential business information submitted by taxpayers and so that in the drafting of its rulings in the future, the Service can delete such confidential commercial and financial data as might otherwise have been incorporated in them.

We read this request as simply another way of saying that the plaintiffs should be denied the information they seek.[6] They did not come into court as champions of a cause, but as citizens seeking information to which they claim they were entitled under the Act.

The difficulty with the position of the Service is that it claims altogether too much protection from disclosure and offers altogether too little specific justification. This posi-

---

[6] The record does not contain a judicial finding that requests by taxpayers for letter rulings are in fact made upon the assurance that the rulings will be kept confidential. Indeed, the government admits that a small number of such rulings, after editing, are published each year by the I.R.S. The government does not state whether taxpayer consent is obtained. [Response to Request for Admissions, No. 14].

tion is not unlike that rejected by this court in *Tennessean Newspapers* v. *Federal Housing Administration, supra,* in which Judge Edwards observed that "such a view, carried to its logical conclusion, would allow the District Court to review a petition for disclosure totally independent of the Freedom of Information Act and its purposes and standards."[7] 464 F. 2d at 661. While our ruling in that case must necessarily be understood in the context of the practical and equitable considerations set forth in *EPA* v. *Mink, supra,* we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act, nor do we conceive that we may postpone the effective date of its operation.[8]

---

[7] In *Tennessean Newspapers* v. *Federal Housing Administration,* 464 F. 2d 657 (6th Cir. 1972), the district court had ordered disclosure of an appraisal, but permitted the withholding of the name of the appraiser. We reversed, holding that in the context of that case, the district court was without power to "vary the standards" established by the Act by permitting non-disclosure "absent the applicability of one of the specific exemptions".

[8] The Service cites *Evans* v. *Department of Transportation of the United States,* 446 F. 2d 821 (5th Cir. 1971), *cert. denied* 405 U.S. 918 (1972), as authority that courts should not permit disclosure of information submitted with the understanding that it would be kept confidential. The difference between *Evans* and the facts here is apparent. *Evans* dealt with a specific document submitted by a confidential informer with the express reservation that his identity would remain confidential. Such information was specifically exempted under 49 U.S.C. § 1504. Further, it was held that the information sought in that case was a part of an investigatory file compiled for law enforcement purposes within the meaning of subsection (b)(7) of the Act. No claim under that subsection has been made in these proceedings to date.

CONCLUSION

In conclusion, we stress as we did in the first *Hawkes* case, 467 F. 2d 787, *supra,* that the merits of any claim of exemption of a particular document are not before us. See also *Renegotiation Board* v. *Bannercraft Co., supra,* at 26. Any such claims must yet be decided by the district court upon invocation of the *in camera* inspection provision in its order. We are satisfied that the order as entered contains sufficient flexibility for its implementation to permit the express purposes of the Act to be carried out in a manner consistent with equitable principles and fairness to all involved. In addition to the guidance already available in the decisions of this circuit, we believe the district court will be able to draw upon the practical alternative remedies to an onerous document-by-document *in camera* inspection by the trial judge, as pointed out in *EPA* v. *Mink, supra,* 410 U.S. at p. 93. Imaginative procedures, such as those suggested in *Mink,* should in large measure alleviate the apprehended governmental burden and substantially reduce the 6,000 hours which its affiants estimate to be required to produce and examine the requested documents.

Accordingly, the judgment of the district court is affirmed and the case remanded to the district court for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRUEHAUF CORPORATION, WILLIAM E. GRACE, ROBERT ROWAN,

Defendants.

Criminal No. 45325

MEMORANDUM AND ORDERS

* * *

MOTION FOR DISCOVERY AND INSPECTION

* * *

Paragraph 6 of the motion reads as follows:

> All private rulings and letter rulings issued by the National Office of the Internal Revenue Service since January 1, 1954, with respect to: Sections 4061(a)(1), 4216(a), 4216(b)(1) and (2), 4216(f) and 6416(c) of the Internal Revenue Code of 1954, and all Treasury Regulations issued or used in connection with such sections, in respect to determinations of: the "price" for which an article is sold; the applicable "constructive sales price" resulting from sales in the ordinary course of business, sales to retailers, sales to wholesalers, or sales to wholesale distributors; the "existence" of a retailer, wholesaler or wholesale distributor; or the "existence" of sales at retail, sales at wholesale, and sales to wholesale distributors.

In the defendants' Motion for Disclosure of Exculpatory Information the defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. In its response the Government concedes that under Section 552(a)(3) of 5 U.S.C. (the Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers defendants to 26 C.F.R., Section 601.702(c).

In a supplemental brief in support of its request in paragraph 6 of its motion the defendants rely upon *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787, 789-791 (CA 6, 1972) as authority for obtaining the material requested in said paragraph. The facts involved in *Hawkes* are as follows: Hawkes was indicted for tax fraud. As part of his effort to prepare a defense Hawkes sought to obtain information and documents held by the Internal Revenue Service. He sought some of the desired material through the regular discovery procedures provided by Rules 16 and 17(c) of the Rules of Criminal Procedure. Additionally he sought materials and information directly from the Internal Revenue Service. Concerning this the Court said:

> In July, 1970 a letter was sent to the Assistant Commissioner of Internal Revenue formally requesting: (1) copies of Forms 899 and 4340 recording past assessments and payments relevant to *Hawkes' federal tax obligations;* (2) copies of IRS documents pertaining to the "closing" of an audit of Hawkes' 1965 tax returns; (3) specified portions of the Internal Revenue Manual relating to the examination of returns, interrogation of taxpayers by agents of the

> Service and other matters which Hawkes felt would be useful in preparing a defense. While the first two sets of material had also been requested in the motion for discovery, the Manual was requested for the first time in the letter to the Assistant Commissioner. [Emphasis supplied.]
> • • •
> The parties' attention on appeal, as below, has of course been focused upon the question of whether or not disclosure of the designated portions of the Internal Revenue Service Manual is required by the Freedom of Information Act. It is to a consideration of that question that we now turn.

The question that has been submitted for the consideration of the Court of Appeals in the Hawkes case is not one involving the same type of request that is contained in paragraph 6 of the defendants' Motion for Discovery and Inspection.

The Court of Appeals for the Ninth Circuit, in *Gollaher* v. *United States,* 419 F 2d 520, 527-528 (CA 9, 1969) considered a question involving inspection not too unlike the request of the defendants in paragraph 6 of their motion. That Court determined the matter as follows:

> Appellants claim that intra-agency communications might have shown that the F.H.A.'s attitude in pursuing the prosecution was one of bias and that it was error not to permit inspection of such communications.
>
> While "the determination of what may be useful to the defense can properly and effectively be made only by an advocate," [Dennis v. United States, supra at 875, 86 S.Ct. at 1851] the materials upon which such a determination is sought to be made must in the first instance be discoverable, a prerequisite absent in this case. Federal Rules of Criminal Procedure, Rule 16(b) provides in part that the discovery authorized by Rule 16 "does not authorize the discovery or inspection of

> reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case • • •." There are two exceptions. The first is the authorization of inspection of any relevant results or reports of physical or mental examinations, scientific tests or experiments made in connection with the particular case. The second relates to the right in a criminal prosecution to inspect a statement or report in the possession of the United States which was made by a government witness or prospective government witness after said witness has testified on direct examination in the trial of the case. 18 U.S.C. §3500. Neither exception is applicable in the present case.

In the Government's Supplemental Memorandum in Opposition to Defendants' Motion for Inspection of Private Revenue Rulings, the Government concluded with the following:

> The Government will produce for *in camera* inspection by this Court any private revenue ruling within its possession which is identified by the Defendants as one upon which they relied. The Government requests *in camera* inspection by the Court in order to protect any third-party taxpayer from disclosure of confidential or privileged information which may be contained in any such private ruling.

With the exception of the Government's foregoing offer, the request in paragraph 6 is denied.

Paragraph 7 of the motion is as follows:

> All documents in the possession of the government which indicate that other taxpayers subject to the manufacturer's excise tax, computed a tire tax credit based on the invoice price of tires rather than the invoice price less subsequent rebates or trade and volume discounts.

The request in paragraph 7 of defendants' motion is denied for the same reasons this Court denied the request in paragraph 6.

APPENDIX C

5 U.S.C. 552 [AS AMENDED BY SECTION 1(b) AND 2(c), PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561, 1564]. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

* * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying —(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * *

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(b) This section does not apply to matters that are—

* * *

(3) specifically exempted from disclosure by statute;

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6103. [as amended by Sec. 4(a), Act of November 2, 1966, P.L. 89-713, 80 Stat. 1107] PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS.

(a) *Public Record and Inspection.*—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) [as amended by Sec. 3(c), Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809 and Sec. 601(a), Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136] All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

(b) *Inspection by States.*—

(1) *State officers.*—The proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of any corporation, at such times and in such manner as the Secretary or his delegate may prescribe.

(2) *State bodies or commissions.*—All income returns filed with respect to the taxes imposed by chapters 1, 2, 3, and 6 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph. The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection on behalf of such official, body, or commission. The inspection shall be made in such manner, and at such times and places, as shall be prescribed by regulations made by the Secretary or his delegate. Any information thus secured by any official, body, or commission of any State may be used only for the administration of the tax laws of such State, except that upon written request of the governor of such State any such information may be furnished to any official, body, or commission of any political subdivision of such State, lawfully charged with the administration of the tax laws of such political subdivision, but may be furnished only for the purpose of, and may be used only for, the administration of such tax laws.

(c) *Inspection by Shareholders.*—All bona fide shareholders of record owning 1 percent or more of the outstanding stock of any corporation shall, upon making request of the Secretary or his delegate, be allowed to examine the annual income returns of such corporation and of its subsidiaries.

(d) *Inspection by Committees of Congress.*—

(1) *Committees on ways and means and finance.*—

(A) The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and

Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

(B) Any such committee shall have the rights, acting directly as a committee, or by or through such examiners or agents as it may designate or appoint, to inspect any or all of the returns at such times and in such manner as it may determine.

(C) Any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and the House, as the case may be.

(2) *Joint committee on internal revenue taxation.*—The Joint Committee on Internal Revenue Taxation shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House of Representatives, the Committee on Ways and Means, or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be.

(e) *Declarations of Estimated Tax.*—For purposes of this section, a declaration of estimated tax shall be held and considered a return under this chapter.

(f) [as amended by Sec. 4(a)(2), Act of November 2, 1966, *supra*] *Disclosure of Information as to Per-*

sons Filing Income Tax Returns.—The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year.

TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION (26 C.F.R.):

§ *301.6103(a)—1. Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order.* (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

* * *

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term "return" includes—*(a)* Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and *(b)* Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under *(a)* of this subdivision. * * *

APPENDIX D

[Filed and Entered January 30, 1974]

In the United States District Court for the Eastern District of Michigan

Civil No. 4-70345

FRUEHAUF CORPORATION, A MICHIGAN CORPORATION, ET AL., PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT

Order

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, and State of Michigan, on January 30, 1974.

Present: Honorable THOMAS P. THORNTON, District Court Judge

Upon the considerations expressed in the Court's Opinion entered herein on January 11, 1974 and upon consideration of the entire record herein, it is,

ORDERED, That Defendant's Motion for Summary Judgment be and hereby is denied, and it is

FURTHER ORDERED, that pursuant to 5 U.S.C. 552 and Rule 65(a)(2) of the Federal Rules of Civil Procedure, Defendant, its agents, attorneys and employees are permanently enjoined from withholding the records requested by Plaintiffs and it is,

FURTHER ORDERED, that commencing from the date upon which Defendant is personally served with a true copy

this Order, and continuing for such reasonable length of time as may be necessary, Defendant shall make available to Plaintiffs for inspection and copying, all of the following records and documents intact and without deletion, except for those items which, within said period of time, Defendant submits to the Court, or to a Special Master, to be appointed by the Court, sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court or his Special Master, as to whether the proposed deletions are justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion:

(1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical), Internal Revenue Service, which were issued between January 1, 1947 and to September 13, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

(a) All items includable or excludable in the price for which a taxable article is sold under section 4216(a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.

(b) The methods, means, formulae or procedures for determining or computing, by a manufacturer of taxable articles, the applicable constructive sales price, under section 4216(b), section 4216(b)(1), and section 4216(b)(2),

of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, upon sales by such manufacturers to:

(1) a retailer

(2) a wholesaler

(3) a wholesaler distributor

(4) a user or ultimate consumer

(c) The existence or non-existence under section 4216 (b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1-5 and Treasury Regulations 46 (1940), Sections 216.8, 316.10, 316.12, 316.13, 316.14 and 316.15, of:

(1) a retailer

(2) a wholesaler

(3) a wholesale distributor

(4) sales at retail

(5) sales at wholesale

(6) sales to wholesale distributors

(d) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the applicable exclusion of *local* advertising charges from the sales prices of taxable articles under section 4216(f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(e) The methods, means, formulae, of procedures for determining or computing, by a manufacturer of taxable articles, the credit for tax paid on tires or inner tubes under

section 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(f) The definition of the term "the purchase price" as used in section 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(g) The definition(s) of taxable and nontaxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under section 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(h) The methods, means, formulae or procedures for computing the applicable tax under sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

The terms "private rulings and/or letter rulings" shall include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

(2) The files including correspondence, analysis and submissions of fact applicable to the issuance of:

Revenue Ruling 62—68, 1962—1 CB 216

Revenue Ruling 68—254, 1968—1 CB 479

Revenue Ruling 68—202, 1968—1 CB 477

Revenue Ruling 68—519, 1968—2 CB 513

Revenue Ruling 69—394, 1969—2 CB 206

Revenue Ruling 54—25, 1954—1 CB 258

Revenue Ruling 54—448, 1954—2 CB 412

Revenue Ruling 54—61, 1954—1 CB 259

Revenue Ruling 283, 1953—2 CB 425

Revenue Ruling 62—221, 1962—2 CB 251

Revenue Ruling 63—238, 1963—2 CB 519

Revenue Ruling 58—287, 1958—1 CB 426

Revenue Ruling 60—241, 1960—2 CB 329

Revenue Ruling 59—74, 1959—1 CB 350

Revenue Ruling 59—163, 1959—1 CB 353

Revenue Ruling 65—9, 1965—1 CB 491

Revenue Ruling 60—185, 1960—1 CB 412

Revenue Ruling 69—580, 1969—2 CB 209

Revenue Ruling 69—568, 1969—2 CB 209

Revenue Ruling 71—240, 1971—1 CB 372

Revenue Ruling 68—509, 1968—2 CB 508

Revenue Ruling 70—54, 1970—1 CB 218

Revenue Ruling 73—231, IRB 1973—21, 11

(3) Communications with respect to such private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitations, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations, and it is,

(4) All items of the letter ruling indexing systems of the Internal Revenue Service as will enable Plaintiffs to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those ordered available above, have been issued by the Treasury, including, but not limited to:

(a) the index-digest card file which is maintained by the Office of the Assistant Commissioner (Technical) involving "reference" (formerly "precedent") private and/or letter rulings files; and

(b) the sets (blocks) of cards maintained in alphabetical order by the Technical Records Section of Defendant that separately refer to all Technical files by taxpayer name and date of the file, beginning in 1954, involving "routine" (formerly "non-precedent") private and/or letter rulings files, and it is

FURTHER ORDERED, that Defendant shall not destroy or otherwise dispose of or alter any of the foregoing records and documents without the prior approval of this Court, after notice to the Plaintiffs.

/s/ *Thomas P. Thornton*
Thomas P. Thornton,
Judge.

A true copy, Henry R. Hanssen, Clerk, by V. Barrow, Deputy Clerk.

APPENDIX E

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
Civil No. 4-70345

FRUEHAUF CORP., a Michigan corporation, WILLIAM E. GRACE, AND ROBERT D. ROWAN, PLAINTIFFS
v.

INTERNAL REVENUE SERVICE, DEFENDANT

MEMORANDUM RE UNLAWFUL WITHHOLDING OF RECORDS

Plaintiffs herein commenced this action by filing their COMPLAINT REQUESTING AN INJUNCTION AGAINST UNLAWFUL WITHHOLDING OF RECORDS AND AN ORDER FOR PRODUCTION OF SUCH RECORDS. The action is brought pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552. Plaintiffs here are defendants in a criminal action (No. 45325) in this court, brought by the United States against them in a one-count indictment that charges a conspiracy to:

(1) Defraud the United States by impeding, imparing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes;

(2) Attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code), the payment of $12,344,587.31 in Federal Excise Taxes to be due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965:

(3) Aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code); of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling $12,344,-587.31.

During the course of pretrial discovery proceedings in the criminal case the defendants therein sought to obtain from the Government various records and material within the possession of the Government which they claimed would supply information essential to their defense. The position of the Government was that these were not properly subject to discovery in the criminal case but they could be obtained under the provisions of the Freedom of Information Act. The defendants in said criminal case then filed the instant civil action against the Internal Revenue Service. (The Court, in the criminal case, denied the discovery there sought by defendants on the theory that the Government appeared to be willing to furnish the information sought, pursuant to the Freedom of Information Act.) Subsequent to the filing of the instant action under the Freedom of Information Act the Government's position is that the documents sought are not available to plaintiffs under the Freedom of Information Act.

In their Answers to Interrogatories filed November 27, 1973, at page 2 thereof, plaintiffs give a general description of said documents as follows:

> In general, Plaintiffs seek copies of unpublished private rulings and/or rulings, as defined in the complaint, originating in the Miscellaneous and Special

> Provisions Tax Division, Excise Tax Branch, Office of Assistant Commissioner (Technical), Internal Revenue Service, between January 1, 1947 and June 26, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semitrailer, or to any trade association of any one or more such manufacturers. In paragraphs 5a(1)(a) through 5a(1)(h) of Plaintiffs' Complaint, the specific subject matters of rulings requested are described in detail.

The specific subject matters of the rulings requested are set forth in the paragraphs as above indicated. They relate to those types of determinations which plaintiffs conceive to be relative to their defense of the charges contained in the indictment in the criminal case.

The Government filed its Motion for Summary Judgment requesting dismissal on the grounds that the "requested documents are exempt from disclosure under Section 552 (b)(3), Title 5 U.S.C. because of Section 6103 of the Internal Revenue Code of 1954."

The parties have filed extensive briefs herein, and the Court file contains numerous pleadings including various sets of interrogatories and answers thereto. Plaintiffs' Answers to Interrogatories filed November 27, 1973 (docket entry No. 18) contains the following paragraph, which we deem of controlling significance:

> The documents sought are essential to the proper defense of the criminal case in view of the fact that under the authority of *International Business Machines Corporation* v. *U.S.*, 343 F. 2d 914 (Ct. Cl. 1965), cert. den. 382 U.S. 1028, if rulings were issued to other

taxpayers which provided a benefit to those taxpayers which Fruehauf did not enjoy, then Fruehauf is entitled to the benefit of such rulings. The basis for this theory is Section 1108(b) of the Revenue Act of 1926 which provides that if the Service has issued a ruling, Treasury decision or regulation holding the sale or lease of an article was not taxable and a taxpayer has parted with possession of an article relying upon the ruling, regulation, or Treasury decision, that such item was not taxable, then no tax shall be levied, assessed or collected. In the case of *International Business Machines Corporation* v. *U.S., supra*, the Court of Claims had presented to it the question of whether, if such a ruling were granted to a third party, the benefit of such ruling must also be granted to other taxpayers. The Court of Claims concluded that in view of the fact that a ruling, which had been issued to one taxpayer, could not be revoked retroactively, that such ruling must be made available to other taxpayers during the period it was unrevoked in order to carry out the intent of Congress that excise tax not be applied in a discriminatory manner. Thus, under the authority of such case, private rulings which were issued and which remained unrevoked during any period covered by the criminal case must be available to Plaintiffs. Plaintiffs have reason to believe that private rulings which would be favorable do exist, and Plaintiffs are entitled to rely upon such rulings in their defense in the criminal case.

The Freedom of Information Act, 5 U.S.C.A. § 552(b) sets forth nine exceptions to the statutory disclosure act. The one relied upon by the Government—

"(b) This section does not apply to matters that are—

• • •

"(3) specifically exempted from disclosure by statute;" 5 U.S.C.A. § 552(b)(3).

is relied upon, the Government says, because of 26 U.S.C.A. § 6103. We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing Income Tax Returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relevant to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code.

The Sixth Circuit has provided us with guidelines and helpful discussion concerning the Freedom of Information Act in the case of *Hawks* v. *Internal Revenue Service*, 467 F. 2d 787 (1972). Although the facts in that case are entirely different from the instant situation the opinion of the Court of Appeals in *Hawkes* convinces this Court that the material here sought by plaintiffs should be made available to them and that such material as they seek does not come within the nine exceptions set forth in the Act.

An order in accordance with the foregoing may be presented on notice.

THOMAS P. THORNTON,
United States District Judge.

Dated: January 11, 1974.

APPENDIX F

TAX REFORM BILL OF 1975
(H.R. 10612)

Sec. 1212. Public Inspection of Written Determinations by Internal Revenue Service
Bill Sec. 1212(a)

(a) REQUIREMENT THAT WRITTEN DETERMINATIONS BE OPEN TO PUBLIC INSPECTION.—Subchapter B of chapter 61 (relating to miscellaneous provisions) is amended by redesignating section 6110 as 6111 and by inserting after section 6109 the following new section:

"Sec. 6110. Public Inspection of Written Determinations.

"(a) GENERAL RULE.—Except as otherwise provided in this section, the text of any written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe."

• • •

APPENDIX G

Form **720** (Rev. Jan. 1974) Department of the Treasury Internal Revenue Service

Quarterly Federal Excise Tax Return

Use to report Excise Taxes for 1974.

Part I

Facilities and Services	Rate	Tax	IRS No.
Toll telephone service; Teletypewriter exchange service; Local telephone service	8%		22
Transportation of persons by air	8%		26
Use of international air travel facilities	$3.00 per person		27
Transportation of property by air	5%		28
Policies issued by foreign insurers	(*)		30
Manufacturers			
Truck, bus, and trailer chassis and bodies; tractors	10%		33
Parts or accessories for trucks, etc.	8%		40
Fishing rods, etc., and artificial lures, etc.	10%		41
Pistols and revolvers	10%		32
Firearms	11%		46
Shells and cartridges	11%		49

Products and Commodities	Rate	Tax	IRS No.
Sugar	(*)		60
Diesel fuel and special motor fuels	(*)		61
Gasoline (manufacturers tax)	4¢ gal.		62
Fuel used in noncommercial aviation: Fuel other than gasoline	7¢ gal.		69
Fuel used in noncommercial aviation: Gasoline (retailers tax)	3¢ gal.		14
Lubricating oil	6¢ gal.		63
Tires: highway vehicle type	10¢ lb.		66
Tires: laminated	1¢ lb.		
Tires: other	5¢ lb.		
Inner tubes	10¢ lb.		67
Tread rubber (camelback)	5¢ lb.		68
TOTAL TAX (Enter here and in item 1 below.)			*

*See instructions on page 2.

Part II

1. Total tax. (Before making entries in items 1 to 9, compute your total tax in Part I above.)
2. Adjustments. (See instructions. Attach statement explaining adjustments.)
3. Tax as adjusted. (Item 1 plus or minus item 2.)
4. (a) Record of Tax Liability. (See instructions on page 4.)

Period		(a) Amount of Liability	(b) Date of deposit	(b) Amount
First Month	1st–15th day			
	16th–last day			
	Total for month			
Second Month	1st–15th day			
	16th–last day			
	Total for month			
Third Month	1st–15th day			
	16th–last day			
	Total for month			

(c) Total Liability for Quarter

(d) Final deposit made for quarter (see note under item 7)

(e) Total deposits for quarter (including final deposit made for quarter)

5. Overpayment from previous quarter
6. Total deposits (item 4(e) plus item 5)
7. Undeposited taxes due (item 3 less item 6; this should be $100 or less). Pay to Internal Revenue Service

Note: If undeposited taxes due at the end of the quarter are more than $100, the entire balance must be deposited. This deposit must be entered in the deposit schedule above in item 4(d).

8. If item 6 is more than item 3, enter excess here ▶ $ and check if you want it: ☐ applied to your next return, or ☐ refunded to you.
9. If not liable for returns in succeeding quarters, write "FINAL" here ▶ and return this form to your Internal Revenue Service Center.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.

Signature ▶ Title (Owner, etc.) ▶ Date ▶

Please enter your name, address, employer identification number, and calendar quarter of return, if not printed. (If not correctly printed, please change.)

Quarter ending

Employer identification number

T	
FF	
FD	
FP	
I	
T	

If your address is now different from previous return, check here ▶ ☐

Please return this form to your Internal Revenue Service Center
(See last item of instructions, "Where to File")

Form **720** (Rev. 1-74)